No. 73-704

In the Supreme Court of the United States

OCTOBER TERM, 1973

STEPHEN ALLEN TARIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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The issue presented is whether the failure of petitioner's local Selective Service Board to reopen his classification when notified that he was awaiting trial on criminal charges invalidated his subsequent induction order.

Following a jury-waived trial before the United States District Court for the Southern District of New York, petitioner was convicted of willfully failing to report for induction into the armed services, in violation of 50 U.S.C. App. 462(a). He was sentenced to one year's imprisonment and a fine of $2,500 (Pet. App. 9a-14a). The court of appeals affirmed without opinion (Pet. App. 15a).

Petitioner registered with Selective Service on December 24, 1964 (SSF 3).[1] He was classified I-S(H) since he

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[1] "SSF" refers to petitioner's Selective Service File, which we are lodging with the Clerk.

had not yet completed high school. He was subsequently deferred as a college student (II-S). He was reclassified I-A on January 23, 1968 (SSF 11) after he failed to provide current information documenting his student status, which had been requested by the local board (SSF 26). At a personal appearance on April 11, 1968, he told the board that he had discontinued classes because of illness. He presented a doctor's certificate to that effect and promised further information (SSF 54-58). His file was reviewed and reopened on May 14, 1968; since no new information had been submitted, the I-A classification was renewed (SSF 10). A notice of appointment with a government appeal agent for June 18 was mailed to petitioner on June 5, 1968 (SSF 60).

On June 8, 1968, petitioner mailed the following letter to his board (SSF 61):

> My parents are quite ill and need to have me around. I did not know before that because of this I might qualify for a dependency deferment and I thus request another personal appearance, at which I could present the evidence in this matter to my local board. In any case, I will be sending you the medical information, letters, and other facts, in this case so that this might be sonsidered (*sic*) by the State Appeal Board.
>
> Also, I understand that I should inform you of the fact that I am now being prosecuted for criminal trespass in New York County, and I hereby do so.
>
> Thank you for arranging an interview for me with the Government Appeal Agent. However, as I have a summer job here in Los Angeles I will now be unable to appear in New York, Tuesday, June 18th. Could

> you therefore either arrange that I have my interview with the Government Appeal Agent here in Los Angeles or else that I have it in New York in September, as I will have to appear in New York in September in regards to the criminal charges lodged against me.

The letter bore a Los Angeles mailing address. Upon receipt of this letter, the local board mailed a dependency questionnaire to petitioner, directing that it be returned promptly (SSF 66). On June 18, the appeal agent recommended that the file be held open until September, as petitioner requested (SSF 65). On November 1, 1968, petitioner's interview was rescheduled for November 19 (SSF 67). He did not appear at that time or otherwise communicate with the board, and he did not reply to two further communications directed to him (including a request to return the dependency questionnaire). None of the letters sent by the board was returned, and his mother informed the board that petitioner could be reached at the Los Angeles mailing address that the board was using (SSF 71).

Following a final review by the appeal agent on January 21, 1969 (SSF 73-74), the case was forwarded on appeal; petitioner was reclassified I-A by the Appeal Board on March 12, 1969 (SSF 10, 27). A current information questionnaire was mailed to him on March 13 at the Los Angeles address but was not returned until April 11 (SSF 80).

On March 26, 1969, an order to report for induction was mailed to petitioner's Los Angeles address directing him to report on April 10, 1969 (SSF 75). In a letter postmarked April 9, petitioner wrote the local board again stating that he was awaiting trial on criminal charges, and claiming that he had not received

the dependency questionnaire. He requested a personal appearance, an appeal, and another chance to fill out the dependency questionnaire (SSF 76-77; Pet. App. 2a-4a). The board reviewed his file once more on April 15, 1969, and declined to reopen (SSF 10). The board so informed him, and instructed him to request a transfer of induction to his area of residence (SSF 84). The petitioner took no action and did not further communicate with the board. This prosecution followed.

1. Petitioner contends that the board erred in failing to consider him for a I-Y or IV-F deferment when, in his letter of June 8, 1968, he first advised that he was being prosecuted on charges of criminal trespass. While it might have been more efficient for the board to request further details and documentation of the criminal charges at the time petitioner was mailed the dependency questionnaire on June 11, 1968, the board's failure to do so denied petitioner no rights to which he was entitled by statute or regulation.

In the letter of June 8, petitioner claimed a III-A (dependency) classification because his parents, both ill, needed his presence at home, but he supplied no supporting facts. He also mentioned briefly his prosecution in New York, which might support a I-Y classification (see Army Regulation 601-270, Chap. 3, Sec. II, Para. 3-9c (1) and (2) (April 19, 1971)). Nothing in the letter suggests a request to be so classified, as required by 32 C.F.R. 1625.2;[2] *United States* v. *Brunner*, 457 F. 2d 1301, 1302 (C.A. 9); *United States* v. *Currier*, 453 F.2d 1242, 1243 (C.A. 9). Since the letter is perfectly clear in requesting only the dependency deferment, petitioner's argument

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[2]All references to the Selective Service Regulations are to those in effect in 1968 and 1969.

(Pet. 9) that the statement concerning his prosecution should be "liberally construed" as a second request for reopening on different grounds is devoid of merit. *United States* v. *Brunner, supra; United States* v. *Pompey*, 445 F.2d 1313, 1320-1321 (C.A. 3).

Moreover, the letter stated no *prima facie* case for either deferment, as there was no request "accompanied by written information presenting facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification." 32 C.F.R. 1625.2. No reopening of his classification was therefore required. *Mulloy* v. *United States*, 398 U.S. 410. Petitioner stated that his parents were ill and needed his presence, yet did not state that he was contributing to their support, or even that he was then living with them.[3] At trial, he could not even remember their address during this time (Tr. 113-115, 119, 172). He provided in addition only the totally unsupported allegation that he was being prosecuted for criminal trespass in New York County. The charges were not sufficiently identified as to court or violation to enable any decision to be made by the board. In any event, the mere retention in custody of any registrant does not extinguish his lawful obligations under Selective Service law, 32 C.F.R. 1642.32, and he would be obliged to perform all lawful obligations upon release. 32 C.F.R. 1642.33, and see *United States* v. *Brunner, supra*.[4]

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[3]Since his previous mailing address had been that of his parents in New York (SSF 4, 5), and his letter indicated he had a summer job in Los Angeles and gave a Los Angeles mailing address, the implication was that he was not living with them.

[4]Petitioner testified that the criminal trespass charge against him was dismissed shortly after he got his induction notice (Tr. 88-89).

Although no reopening was appropriate on receipt of petitioner's June 8 letter, the board did attempt to obtain additional information which might require a reopening. It thus attempted to meet its obligation to "keep informed of the status of classified registrants." 32 C.F.R. 1625.1. Petitioner was, accordingly, mailed a dependency questionnaire (SSS Form 118) on the day his letter was received. It was not inappropriate for the board to investigate the possibility of this deferment first, since it was the only deferment he had requested and since any registrant must be "classified in the lowest class for which he is determined to be eligible." 32 C.F.R. 1623.2

Even if the board had taken no action at all in June 1968, petitioner would not have been prejudiced, since petitioner had an appeal pending, and the regulations proscribe issuance of an order to report for induction while an appeal is pending. 32 C.F.R. 1626.41. After petitioner was classified I-A by the Appeal Board, he was sent a current information questionnaire and directed to return it promptly (SSF 80). Had he done so, and presented in a timely manner information indicating that a reopening was appropriate, the board would doubtless have considered his claims. As it was, the questionnaire was not returned until after the induction notice issued. The board therefore properly refused to reopen.

When the file was ultimately forwarded to the Appeal Board in January 1969, eleven months had elapsed since petitioner's prior classification and request for appeal. He had not responded to four mailings from the board, which the court found to have been received, and which would have afforded a basis for final action on his appeal or a reconsideration of his classification. He had not reported for his rescheduled interview with the appeal

agent or otherwise communicated with the board, in spite of a letter from his parents in November which had verified his Los Angeles mailing address. For the board to have delayed his processing further would have allowed him to prevent his own induction by willful noncooperation and would have prejudiced the rights of other registrants inducted in his stead. The lack of new information following return of the file from the Appeal Board precluded any possibility of perfecting either a I-Y, IV-F or III-A classification.

2. Petitioner's claim that he was denied due process because the local board members did not see and consider his letter of June 8, 1968, which allegedly presented a *prima facie* claim for a lower classification, is unsupported in the record. The record, contrary to petitioner's claim, does not show whether the letter was brought to the personal attention of the board or handled only at the staff level, although the logical course of procedure would be for the executive secretary to file the letter and mail the dependency questionnaire, and then bring both documents to the personal attention of the board when the questionnaire was returned with sufficient information to permit the board to act.

If the letter here was not brought to the personal attention of the board, it would not invalidate the induction order, since the action taken--the attempt to obtain more information--was unquestionably proper. We recognize that several district court decisions have ruled that 32 C.F.R. 1622.1(c) requires board, and not merely staff, consideration of all information received from a registrant relating to his classification, regardless of whether a *prima facie* claim is presented, see *United States* v. *Moyer*, 307 F. Supp. 613, 615 (S.D. N.Y.); *United States* v. *Walsh*, 279 F. Supp. 115, 120-121 (D. Mass.),

but no court of appeals has so ruled, except in the context of a *prima facie* case where reopening would be required under *Mulloy* v. *United States, supra.*[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.

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[5] *United States* v. *Ford*, 431 F.2d 1310 (C.A. 1), relied on by petitioner, involved letters which represented, in the court's view, "vital new information" (*id.* at 1312). See also *United States* v. *Jackson*, 454 F.2d 821 (C.A. 5), and *United States* v. *Stockwell*, 485 F.2d 700 (C.A. 1). The question of when board, as distinct from staff, action is required is more fully considered in our memorandum in opposition in *Thrower* v. *United States*, No. 73-5621, certiorari denied February 19, 1974, petition for rehearing pending. We are sending a copy of that memorandum to petitioner.